34872-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER RAMIREZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the premeditation element of both first-degree murders were proven beyond a reasonable doubt?

2. Was the delay, between the time of the murder where a witness was shown several photographic lineups, until the time of trial, wherein the witness identified the defendant, a violation of the federal due process clause, if no improper police conduct has been alleged or established by the defendant?

3. Has the defendant established article one, section three (due process) of the state constitution affords greater protection than the due process provisions contained within the federal constitution regarding eyewitness identification?

4. Did the trial court abuse its discretion when it allowed a witness to testify that her father was kind, had a sense of humor, and was church-going?

5. If it was error to allow the witness to testify to these several, conventional characteristics, has the defendant established these remarks impacted the verdict?

6. Did the trial court abuse its discretion by allowing witness Ms. Valero to testify the defendant's moniker was "Demon?" If it was error, was it harmless where it was cumulative of other competent, admissible evidence?

7. Did the deputy prosecutor commit misconduct during closing argument by asking the jury to consider the defendant's thought process when he fired multiple gunshots at Juan Gallegos, and by stating that the end of Mr. Gallegos' life must have been miserable?

8. By not objecting to the prosecutor's comments during closing argument, has the defendant established the alleged misconduct was so flagrant and ill-intentioned that an instruction could not have cured any claimed prejudice, and, did the alleged misconduct, in the context of the total argument, result in prejudice that had a substantial likelihood of affecting the jury verdict?

9. Has the defendant established the trial court erred, when it conducted a *Frye* hearing on the admissibility of the FBI's historical cell phone site analysis regarding the approximate location of the defendant's cell phone the night of the murders, and determined the analysis was not a new or novel scientific procedure and was generally accepted within the relevant community of cellular telephone businesses?

10. Was a July 15, 2014 text message sent by the defendant threatening a group of family members, including the murder victims, probative of the defendant's premeditation, motive, and intent to kill the murder victims?

11. After failing to object to the information and jury instructions, did the defendant receive adequate notice of the State's intent to prove aggravated first degree murder?

12. If the defendant was sentenced to a standard range sentence for multiple serious violent felonies and his lawyer did not request a mitigated sentence, has he established that the trial court erroneously applied the law, or was unaware of its decision-making authority or its discretion to impose a mitigated sentence?

II. STATEMENT OF THE CASE

1. Procedural history.

Christopher Ramirez was charged by amended information in the Spokane County Superior Court with aggravated first-degree murder of Arturo Gallego, aggravated first-degree murder of Juan Gallego-Rodriquez, and first-degree unlawful possession of a firearm. CP 232-33. Both murder charges contained a firearm allegation. CP 232-33. The defendant was convicted as charged and this appeal timely followed.

2. Substantive facts.

During the month of November 2014, two brothers, Arturo Gallegos[1] and Juan Gallegos-Rodriquez lived in a multiple building apartment complex at 11910 East Broadway in the Spokane Valley. RP 472, 448-49, 453, 455, 534.

Historically, Angel Valerio was married to Rosemary Valerio. RP 268. His father-in-law was Arturo, and his uncle was Juan. RP 369. The defendant, Christopher Ramirez, was Angel Valerio's cousin. RP 372. In July of 2014, there was a falling out between the defendant and Juan and Arturo. RP 373. On July 15, 2014, Mr. Valerio received a text message from the defendant. RP 373, 375. The text was sent to Mr. Valerio, his wife, Arturo, and Juan. RP 375. Included within the text were photos of Arturo and Juan. RP 375. The text message read: "Tio. We all die. Rest in peace. Fuck you all if that's how it is." RP 375. Mr. Valerio believed the message was threatening. RP 398. At the time of the murders, the defendant was not welcome at Gallegos' apartment, due to a disagreement with Juan. RP 432-33. However, Arturo had previously tried to reconcile the relationship between Juan and the defendant. RP 432-33.

[1] Arturo Gallegos will be referred to as "Arturo" and Juan Gallegos will be referred to as "Juan," as needed, for clarity. No disrespect is intended.

Mr. Valerio knew the defendant's nickname was "Demon," as the defendant had personally referred to himself as "Demon" and changed his Facebook account name from "Chris" to "Demon," some time prior to the murders. RP 385.

On November 1, 2014, Ryan Nairine lived next door to Arturo and Juan at the apartment complex on East Broadway. RP 548-49. That evening, Mr. Nairine heard five to six successive gunshots at the apartment complex. RP 541-43, 556. Within four seconds, Mr. Nairine opened his front door and saw a body lying on the ground just next to his door. RP 543-44. Mr. Nairine did not observe anyone fleeing the scene. RP 543-46.

Subsequently, at 9:34 p.m., the Spokane County Sheriff's Office received several 911 calls indicating "shots fired" at the apartment complex. RP 446-49, 547. Sergeant Jack Rosenthal arrived on scene within approximately two minutes of the 911 call and observed a male, later identified as Juan, lying face down, apparently dead. RP 449-51, 454. Juan had no socks or shoes, and was wearing only a t-shirt and athletic shorts. RP 450. It was approximately forty-two degrees outside. RP 739.

Sgt. Rosenthal and several other deputies walked around the building to the rear of the Gallegos' apartment. RP 455-56. Sgt. Rosenthal observed a male in the bedroom, who also appeared deceased with an apparent gunshot wound. RP 456. The rear slider door was unlocked and

there was no sign of forced entry into the apartment or any apparent ransacking. RP 971-72, 1058.

Shortly after the murders, Tammara Allison was outside at the southwest corner of the apartment complex. RP 473-75. She observed someone climbing over the chain link fence behind the complex. RP 473-75.

Carlton Hritsco lived at 11903 East Valleyway, two blocks south of the apartment complex. RP 475, 513. Between 9:30 p.m. and 9:40 p.m., on the day of the murder, Mr. Hritsco was on his back porch and heard the police activity in the neighborhood.[2] RP 513, 517. Contemporaneously, he observed a man appear in his back yard who remarked he was "just cutting through." RP 514. Mr. Hritsco had an "eerie" feeling as the individual identified himself as "Demon." RP 514. Mr. Hritsco simultaneously texted a neighbor friend at 9:41 p.m., asking him to bring a firearm to his location. RP 514-15, 981.

Demon appeared "extremely" nervous to Mr. Hritsco. RP 521. Their conversation lasted fifteen to twenty minutes. RP 516-17. Demon asked for directions to the city bus. RP 517. Demon also dropped a knife and hurriedly picked it up. RP 517. Simultaneously, Demon was texting someone for a

[2] Law enforcement officers had responded to the scene with their lights and sirens activated. RP 460.

ride. RP 518. Mr. Hritsco identified the defendant in the courtroom as the individual named Demon. RP 516.

Two hours later, Deputy Justin Palmer had contact with Mr. Hritsco at his residence. Mr. Hritsco asked the deputy if he was looking for "that Mexican guy" or "that Indian or Mexican guy." RP 475-76, 518. Mr. Hritsco described the person, self-identified as Demon, as approximately 5' 8" tall, weighing 180 pounds, "Hispanic" looking, with long slicked-back hair, some form of acne scars, wearing dark clothing. RP 476. Mr. Hritsco was subsequently shown a facial, photographic lineup with five individuals, including the defendant. RP 477, 484. Mr. Hritsco was unable to identify anyone in the lineup, because none of the men in the photos had long hair. RP 478, 485-86.

Deputy Jeff Thurman arrived on scene with his tracking dog. RP 497. The dog was unable to pick up a scent near the deceased body on the lawn. RP 502. However, the canine successfully picked up a track in the area near the chain link fence in the rear of the complex previously identified by Ms. Allison. RP 503. The dog tracked south through a field directly to Mr. Hritsco's address. RP 504. The canine eventually lost the scent in this general area. RP 505.

At the time of trial, Mr. Hritsco did not recall being shown photographs the night of the shooting, but recalled being shown another

photo lineup several days later. RP 518. He was not "one hundred" percent certain during the second photographic lineup:

> Because the photo was old. And when he was at my house, he had a beanie or his hair up and so, and the photo montage I saw his hair was pulled back and he looked bald in that picture. And so it just, I said, "the face is right on, but I swear he had more hair when he was at my house the other night."

RP 519.

Subsequently, Mr. Hritsco identified the defendant in the courtroom as the same individual he spoke with the night of the murder. RP 516. Mr. Hritsco explained: "I saw an updated photo of him on the news. And as soon as I saw that, it was a cleaner and newer picture, like that's absolutely him." RP 519. He observed the updated photograph approximately four months after the event. RP 520. Regarding the initial unsuccessful identifications, Mr. Hritsco was uncertain because of the hair length of the individuals in the prior photo lineups. RP 520-21.

3. Scene processing.

The crime scene was processed by detectives. Six shell casings were located and collected around Juan's body. RP 570-74. The casings were all stamped WIN (Winchester) 9mm Luger. RP 572, 570-74, 576, 608-09. A 9mm is typically a semi-automatic round of ammunition, requiring the operator to pull the trigger for each discharge. RP 609, 611-12. A spent

cartridge was located under Juan's body. RP 575. The detectives did not recover the firearm used at the time of the murder. RP 974.

At the time of processing, detectives entered the victims' apartment through the rear bedroom slider door.[3] RP 680. The front door to the apartment was closed and locked with a deadbolt when law enforcement made entry into the apartment. RP 681. Based upon the blood evidence, Arturo appeared to be in a seated position before the murder; he had been shot directly in the forehead, causing him to fall backward. RP 572, 683, 691. A cartridge casing was found on Arturo's bed, along with a black knit cap and a right-handed glove, with the glove being pushed inside the cap. RP 690, 692-93, 736, 752. Blood surrounded the glove. RP 750. However, there was no blood underneath the cap or glove. RP 963-64. In total, three Winchester 9mm Luger cartridge cases were discovered in Arturo's bedroom (one on the bed and two on the floor). RP 696, 734. Furthermore, Arturo's cellular telephone was located between his legs. RP 723.

A DNA forensic scientist conducted testing on certain crime scene evidence. Concerning the knit cap and glove found on Arturo's bed, staining consistent with blood was located on the topside seam of the cap and the

[3] The slider door was later processed for fingerprints. RP 967. However, no viable prints of quality were obtained. RP 967-69. In addition, no prints of value were obtained from the front door. RP 970.

outside left index finger of the glove. RP 775, 804, 806-07, 809, 819. The inside of the glove and hat were swabbed, and it was determined the defendant was the major contributor of DNA located on the hat and the glove. RP 807. The blood on the hat matched Arturo. RP 814-15.

Two bullet defects were noticed above the doorknob in the door of Arturo's bedroom.[4] RP 697, 700-01. The crime scene evidence indicated the bedroom door was closed and bullets were fired from within the bedroom, through the door, and into the adjoining hallway. RP 702-03, 730, 733-34. A single flipflop was found in the hallway, near some blood spatter castoff on the wall. That, and other evidence, suggested the spent bullets fired from within Arturo's bedroom struck a person rather than a physical surface inside the apartment. RP 709-10, 734. The blood sample collected in the hallway near the flip-flop matched Juan. RP 769, 775, 817-18. A corresponding flip-flop was discovered near the entry door of the apartment. RP 713, 734.

A note was found and collected in Juan's bedroom which read: "3824 East 17th, Freya/17th." "nephew" and "Demon, South Hill" with a phone number "509-290-2692."[5] RP 686. Nothing had been taken from the apartment after the incident. RP 387-88, 399.

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4 Both defects had a slight downward trajectory. RP 732-33.

5 The telephone number matched defendant's cell phone number. RP 910.

The medical examiner, Dr. Sally Aiken, conducted an autopsy examination on both Arturo and Juan. Arturo had an intermediate gunshot wound, with the entry point near his nose, which fractured two vertebrae, and punctured an artery. RP 854-55, 884. Arturo also had stippling marks on his face.[6] RP 884. The stippling indicated the firearm was most likely fired from within 18 to 24 inches of Arturo's face. RP 885.

Juan suffered multiple gunshot entrance wounds: namely, to his left thigh, lower left groin where the bullet did not exit, left upper arm, to the chest, behind the right ear, above the left ear (back to front), top of the head, middle back area (back to front), and a number of shrapnel injuries about the left arm, palm of right hand, most likely caused by bullets ricocheting, and superficial gunshot wounds to the head.[7] RP 861-63, 867-75. Stippling was also observed on Juan's left forehead. RP 894.

When Juan received the several gunshots to his head, he was immobile, and not in standing position. RP 887, 891. Dr. Aiken opined that

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[6] Dr. Aiken described "stippling," "as marks … caused by grains of gunpowder, and when the bullet is fired, those grains of gunpowder leave the muzzle of the firearm and they travel out the muzzle." RP 884.

[7] Dr. Aiken stated: "[T]he death [of Juan] was attributed to multiple gunshot wounds, because even though those were definitely lethal gunshot wounds, the combination of all these gunshot wounds, say, fractures of the left humorous and soft tissue bleeding, it may be that the cumulative effect, even if he had gunshot wounds to the head, would have resulted in death because he had a lot of gunshot wounds that would have bled." RP 889.

Juan received several gunshot wounds in the hallway, on the way out of the apartment. RP 887. In total, Arturo had one gunshot wound, and Juan had 11 gunshot wounds, in addition to shrapnel wounds. RP 895, 900.

FBI Cell Site Analyst, Jennifer Banks, was asked by detectives to review voice calls, text messages and e-mail records from defendant's cell phone number, 509-290-2692, from the service provider AT&T, in part, from 6:00 p.m. Pacific Time to 11:00 p.m. on November 1, 2014, the day of the murders. RP 910.[8] Agent Banks was also given two addresses in the Spokane Valley (near the crime scene) that were deemed relevant to the investigation. *Id.* Agent Banks was a member and certified as a part of the FBI's Cellular Analysis Survey Team (CAST) in 2011. RP 906. Agent Banks' job involved creating demonstrative maps indicating a cellular telephone's approximate location during a phone call or text. RP 907, 909. She also trained multiple law enforcement agencies on the creation and interpretation of these types of maps. RP 907, 909.

Regarding the telephone and texts of the defendant's cell phone between 9:00 p.m. and 10:00 p.m. on November 1, 2014, there was a voice call at 9:24 p.m., followed by two text messages at 9:41 p.m., and 9:43 p.m., as well as a voice call at 9:59 p.m. RP 951. The agent identified three

[8] Detectives identified this particular telephone number as belonging to the defendant after execution of a search warrant. RP 977-78.

different towers that were most likely activated at the time of the calls and texts. RP 951. Based upon the State's demonstrative exhibit number 165, the towers activated during the 9:24 p.m. voice call, and the 9:41 p.m. and 9:43 p.m. texts arched 120 degrees (similar to a piece of pie)[9] within the general area of the crime scene. RP 921. The 9:59 p.m. voice call activated a tower which arched 120 degrees toward the Dishman Mica area in the Spokane Valley, and it was placed to the city's bus schedule hotline.[10] RP 941, 983.

During the investigation, detectives determined the voice calls and texts history surrounding the time of the murder had been deleted from the defendant's cell phone. RP 979-80, 982-83. In addition, there had been forty-nine undeleted voice calls and texts exchanged between Arturo and

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[9] The 120-degree cell tower arching was explained by the agent:

> The phone companies are going to put multiple antennas on each tower to provide an omni-directional or circle coverage to provide maximum service to its users. If it puts just one antenna up there and tries to beam it out omni-directional, it can't focus the power of the antenna as far as it wants to go. So beam them directly in a certain direction. They tell you where it is. So the 120 degrees would come from a tower that has three sectors on it. So it's equal division of 360 degrees. So 360 divided by 3, so approximate amount 120 degree of coverage if there were three antennas on there. And really, most of these antennas, the way they are configured, they're going to provide that anyway. And we use that as a general rule.

RP 913-14.

[10] A direct route from the apartment complex to the defendant's residence was approximately three to four miles in a northwest direction. RP 994-95.

the defendant, between midnight and 6:40 p.m., on November 1, 2014. RP 1024-29. In those series of texts, Arturo provided the defendant with the apartment complex address, as the two planned to get together on the evening of the murders. RP 1028.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE PREMEDITATION ELEMENT OF FIRST DEGREE MURDER FOR BOTH COUNTS OF FIRST DEGREE MURDER, AND UNLAWFUL POSSESSION OF A FIREARM.

The defendant challenges the sufficiency of the evidence that he premediated the killing of Arturo and Juan. *See* Appellant's Br. at 13-22.

Standard of review.

A sufficiency of evidence challenge is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Id.* at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

"Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must

defer to the factual findings made by the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010).

1. First degree murder.

To convict a defendant of first degree premeditated murder, the State must prove that the defendant acted with "premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). Premeditation is a separate and additional element from the intent requirement for first degree murder. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). A defendant may act with intent to kill but without premeditation. *See State v. Ollens*, 107 Wn.2d 848, 851-52, 733 P.2d 984 (1987).

"Premeditation" is the "deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). It must involve more than a point in time. RCW 9A.32.020(1). "Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection." *Bingham*, 105 Wn.2d at 826. However, there is no fixed or definite length of time between the formation of the intent to kill and the killing necessary to establish premeditation. *State v. Duncan*,

101 Wash. 542, 544, 172 P. 915 (1918). This time may be very brief, even "but a moment."[11] *Id.*

The State may prove premeditation through circumstantial evidence if the inferences drawn from the evidence are reasonable and the evidence is substantial. *State v. Clark,* 143 Wn.2d 731, 769, 24 P.3d 1006, *cert. denied,* 534 U.S. 1000 (2001).

a. Arturo Gallegos.

Here, there was no evidence presented that Arturo or Juan possessed or owned a firearm. Moreover, nothing was taken from the residence at the time of the shooting suggesting a robbery. An important factor here is it can be reasonably inferred the defendant brought a gun to the murder scene. In *State v. Massey,* 60 Wn. App. 131, 145, 803 P.2d 340 (1990), *review denied,* 115 Wn.2d 1021 (1990), *cert. denied,* 499 U.S. 960 (1991), the victim had been shot twice, once in the head and once in the stomach, and stabbed seven times. The court found that evidence that the defendant brought a gun to the location of the murder was sufficient evidence to support a finding of premeditation. *Id.* at 145. *See also Hoffman,* 116 Wn.2d at 83 ("[t]he

[11] The defendant relies on *Bingham*, *supra*, to support his proposition that the State failed to show premeditation. However, *Bingham* is distinguishable because the *Bingham* court held that manual strangulation alone is insufficient evidence to support a finding of premeditation where no evidence was presented of deliberation or reflection before or during the strangulation. 105 Wn.2d. at 827-28.

planned presence of a weapon necessary to facilitate a killing [is] adequate evidence to allow the issue of premeditation to go to the jury"); *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006) ("[s]ufficient evidence of premeditation may also be found where the weapon used was not readily available, where multiple wounds are inflicted, or where the victim was struck from behind"); *State v. Tikka*, 8 Wn. App. 736, 509 P.2d 101, *review denied*, 82 Wn.2d 1007 (1973) (the planned presence of a weapon necessary to facilitate a killing is adequate to allow the issue of premeditation to go to the jury).

In addition, Arturo suffered a single gunshot wound to the head. A single gunshot wound to the head has been held sufficient to establish premeditation in other jurisdictions. *See People v. Romero*, 44 Cal. 4th 386, 401, 187 P.3d 56 (2008) (premeditation was supported where victim was killed by a single gunshot fired from a gun placed against his head, execution style, without struggle and which was unprovoked); *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006) ("A single shot squarely in the back can support a finding of premeditation because it indicates that the shooter took careful aim at the victim"); *State v. Holmes*, 278 Kan. 603, 631-35, 102 P.3d 406 (2004) (sufficient evidence the defendant was capable of forming premeditation where the defendant fired a single shot to his girlfriend's heart at pointblank range without provocation and then chose to

ingest his remaining drugs despite girlfriend's need for medical assistance); *State v. Small*, 328 N.C. 175, 183, 400 S.E.2d 413 (1991) (evidence of premeditation and deliberation was sufficient where evidence showed no provocation or resistance by the victim, who was killed by a gunshot to the head while lying on the floor); *State v. Sullivan*, 131 N.H. 209, 217, 551 A.2d 519 (1988) (firing gun from position maximizing likelihood bullet would strike vital organ indicates premeditation and deliberation); *State v. Hamel*, 123 N.H. 670, 679, 466 A.2d 555 (1983) (shooting victim in brain significant to show premeditation and deliberation).

Here, there was sufficient evidence to establish premeditation regarding Arturo.

b. Juan Gallegos.

Several factors support a finding of premeditation. In addition to the defendant bringing a firearm to the apartment, the jury could have inferred the defendant attempted to kill Juan in the hallway of the apartment when he fired through the closed, bedroom door striking Juan with a bullet, and because the defendant was unsuccessful, he chased Juan outside and fired multiple gunshots at him, striking him several times from behind, and fired at least two gunshots after Juan had been immobilized.

2. Multiple gunshot wounds establish premeditation.

On several occasions, our Supreme Court has found the infliction of multiple wounds or multiple shots is a fact which can support premeditation.

In *Hoffman*, the defendant was convicted of aggravated murder. The Supreme Court found the evidence presented to the jury was sufficient to establish premeditation. In that case, there was evidence the defendant made prior threats to the victims, several deadly weapons were brought to the scene by the defendant, who fired multiple shots at the victims, and one of the victims was shot from behind which entitled the jury to make a finding of premeditation. 116 Wn.2d. at 83; *see also State v. Ortiz*, 119 Wn.2d 294, 311-12, 831 P.2d 1060 (1992) (finding premeditation where multiple wounds were inflicted by a knife and the victim was struck in the face after a prolonged struggle); *Ollens*, 107 Wn.2d at 853 (sufficient evidence of premeditation where the defendant stabbed the victim multiple times and then slashed the victim's throat, the defendant obtained a knife, struck victim from behind, and he had motive to kill).

Other Washington courts have found the same. For example, in *State v. Woldegiorais*, 53 Wn. App. 92, 93, 765 P.2d 920 (1988), the victim was stabbed 14 times, four of the wounds were defensive; the victim was found one and one-half feet from his bed, tangled in the sheets. Also, there was evidence of long-standing animosity between the victim and the defendant.

Id. at 93-94. The jury was entitled to find premeditation. *Id.* at 94; *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992) (evidence that the victim was shot three times in the head, two times after he had fallen on the floor, sufficient to establish premeditation); *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985) (inference of premeditation supported by evidence that victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down).

3. Chasing a fleeing victim.

Other state courts have found that firing shots at a fleeing victim is sufficient to establish premeditation. *See Com. v. Guy*, 441 Mass. 96, 102, 803 N.E.2d 707 (2004) (defendant selected a specific knife to use on the victim, and pursuing the fleeing, wounded victim was sufficient to support the jury's finding of deliberate premeditation); *State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478 (1991) (the victim was fleeing and the defendant shot him three times in the back; three times was held sufficient to establish premeditation and deliberation); *People v. Wells*, 199 Cal. App. 3d 535, 541, 245 Cal. Rptr. 90 (1988) (while the victim fled, the defendant shot him three times in the back; these facts were held sufficient evidence to establish premeditation); *People v. Johnson*, 427 Mich. 98, 115, 398 N.W.2d 219 (1986) (defendant's "pursuit of a fleeing victim can indicate premeditation and deliberation"); *State v. Britt*, 285 N.C. 256, 263, 204 S.E.2d 817 (1974)

(victim had hands raised and was fleeing when defendant shot the victim in the back was sufficient to submit the issue to the jury).

Overall, the facts regarding Arturo and Juan fit within the range of facts where courts have found premeditation, and support a reasonable inference that the defendant formed premeditation at the time of both murders. Thus, viewing the evidence in the light most favorable to the State, the evidence here supports a finding of premeditation and this Court should affirm both convictions of first degree murder.

4. Unlawful possession of a firearm.

The defendant next claims there was insufficient evidence to convict on the first-degree unlawful possession of a firearm charge because there was insufficient evidence that he committed the two counts of premeditated murder with the use of a firearm. *See* Appellant's Br. at 21-22.

To support a charge of first-degree unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the defendant was previously convicted in Washington of a serious offense and had a firearm in his possession or control. *See* RCW 9.41.040(1)(a). Possession of a firearm can mean actual possession or constructive possession. *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Actual possession means that the person charged had "personal custody" or "actual

physical possession" of the firearm. *Id.* at 634 (internal quotations omitted). Actual possession may be proved by circumstantial evidence. *Id.* at 634.

Here, there was sufficient evidence from which a rational jury could find the defendant guilty of first-degree unlawful possession of a firearm. First, the defendant stipulated to a conviction for a previous serious offense pursuant to RCW 9.41. CP 247. Second, although the firearm was not recovered, both victims sustained gunshot wounds; the defendant was identified by a witness as being within the immediate vicinity of the crime scene shortly after the murders; a canine tracked the scent of the defendant from the fence line at the apartment to Mr. Hritsco's address; defendant's hat and glove were found in Arturo's bedroom with the victim's blood on top of it; there was a four-month old text message threatening Arturo, Juan, and others with harm; and there was animosity, either at the time of the murder with Juan or in the past with Arturo. Sufficient evidence supports the jury's finding of guilty that the defendant was in unlawful possession of a firearm on the date of the murders.

B. THE DEFENDANT CAN NOT ESTABLISH A DELAY OF TWENTY-TWO MONTHS BETWEEN THE MURDERS AND THE IN-COURT IDENTIFICATION OF THE DEFENDANT WAS TAINTED BY ANY IMPROPER LAW ENFORCEMENT CONDUCT, IMPLICATING THE FEDERAL DUE PROCESS CLAUSE. ABSENT ANY SUCH ALLEGATION OF IMPROPER POLICE CONDUCT, IT SUFFICES TO TEST THE RELIABILITY OF IDENTIFICATION TESTIMONY THROUGH TRADITIONAL MEANS SUCH AS CROSS-EXAMINATION AND JURY INSTRUCTIONS.

The defendant next argues that a witness's in-court identification was inherently reliable and it should have been excluded by the trial court in violation of the federal due process clause. Appellant's Supplemental Br. at 1-6.[12]

Standard of review.

An appellate court reviews a trial court's decision to admit witness identification evidence for abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

[12] Appellant filed a supplemental opening brief on December 5, 2017, alleging a federal due process violation.

Defendant's CrR 3.6 motion to suppress witness Hritsco's in-court identification.

Pretrial, the defense moved to suppress witness Mr. Hritsco's proposed testimony regarding statements made to him by an individual self-identified as "Demon," shortly after the shooting, in part, claiming any in-court identification would be unreliable based upon Mr. Hritsco's two prior unsuccessful attempts to identify the defendant through several photographic lineups and the lack of circumstantial evidence to substantiate the identification.[13] RP 47-69; CP 66-74, 145-62, 193-96, 218-26.

The trial court denied the motion, holding the identification was corroborated by circumstantial evidence and that any inconsistency of the identification testimony went to its weight, and not admissibility. RP 205-07; CP 301-03.

Under the federal constitution, for exclusion of eyewitness identification to be required by the due process clause, an unnecessarily suggestive identification procedure must have been arranged by law enforcement. *Perry v. New Hampshire*, 565 U.S. 228, 239, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). "[D]ue process concerns arise only when law enforcement officers use an identification procedure that is both suggestive

[13] Detective Drapeau testified at the time of trial that he used six photographs or more and showed them to the witness one photograph at a time, in a series of six or eight photographs. RP 1054.

and unnecessary. Even when the police use such a procedure, … suppression of the resulting identification is not the inevitable consequence." *Id.* at 238-39 (citations omitted). "[T]he Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification." *Id.* at 239 (internal quotations and citation omitted). "Where the indicators of a witness' ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury." *Id.* at 239 (internal quotations and citation omitted).

If the defendant establishes law enforcement involvement, the court then reviews the totality of the circumstances to determine whether the asserted suggestiveness created a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "[R]eliability is the linchpin in determining the admissibility of identification testimony…" *Id.* at 114. However, "[t]he due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct." *Perry*, 565 U.S. at 241. The due process check does not apply "to suspicion of eyewitness

testimony generally, but only to improper police arrangement of the circumstances surrounding an identification." *Id.* at 242.

In *Perry*, the Court acknowledged the defendant's arguments regarding the inaccuracy rate for eyewitness identifications generally, but held that where no improper law enforcement activity is involved, the reliability of eyewitness testimony can be sufficiently tested through evidentiary standards, such as the presence of a lawyer at post-charging lineups, vigorous cross-examination, the rules of evidence, and jury instructions[14] on both the fallibility of eyewitness identifications and the requirement that guilt be proved beyond a reasonable doubt. *Id.* at 233.

Here, deputies showed the witness several photographic lineups containing the defendant within several days of the murders. Within approximately four months after the murders, the witness observed the defendant's photograph on the television, which was a newer photograph than that initially utilized by deputies. The defendant has not alleged *any* improper police conduct which created a "substantial likelihood of misidentification." Rather, he relies on theoretical and untested law review articles suggesting abstractions with no bearing on the particular facts of this case. The *Perry* court considered much of the same literature and it did

[14] In the present case, the trial court permitted a defense proposed instruction and instructed the jury concerning eyewitness identification. CP 256; RP 1129.

"not doubt either the importance or the fallibility of eyewitness identifications." *Id.* at 245. It stated, however, "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." *Id.* at 245. The Court further recognized that a fact-finder, not a court, "traditionally determines the reliability of evidence." *Id.* at 245.

The defendant further argues that the witness viewing a news broadcast four months after the murders was unreasonably suggestive because the witness was able to identify the defendant in court. While that may have presented fodder for cross-examination as to Mr. Hritsco's memory or identification, it did not present a due process concern that required exclusion of Mr. Hritsco's in-court identification. As the Supreme Court in *Perry* explained:

> We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of

> eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry, 565 U.S. at 232-33.

The defendant also claims that Mr. Hritsco was repeatedly exposed to the defendant claiming, "Hritsco's identification of Ramirez from the media and at trial was tainted by the repeated exposure[15] to Ramirez immediately following Hritsco's conversation." App. Supp. Br. at 3. The fact that Mr. Hritsco watched a news broadcast containing a photograph of the defendant does not implicate the due process clause. Under *Perry*, only police-created impermissibly suggestive circumstances implicate due process concerns and thus require a reliability assessment by the trial court. *Perry*, 565 U.S. at 238-41. The deputies had nothing to do with Mr. Hritsco viewing the television clip, so the deputies did not create any of the allegedly suggestive circumstances surrounding his in-court identification.

Regarding the delay from the time of the murders until the in-court identification, which was twenty-two months, these circumstances were not the product of improper conduct by law enforcement. *Perry* concluded that "[t]he fallibility of eyewitness evidence does not, without the taint of

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[15] The "repeated exposure" claim is not supported by the record. As previously stated, deputies showed two different photographic lineups, several days apart, to Mr. Hritsco near the time of the murders and Mr. Hritsco testified he viewed a news broadcast four months after the incident.

improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing a jury to assess its creditworthiness." *Id.* at 245. Indeed, the *Perry* court rejected the passage of time as a basis to exclude in-court identification testimony as unreliable. *Id.* at 244-45*; see also United States v. Thomas*, 849 F.3d 906, 911 (10th Cir.), *cert. denied*, 138 S.Ct. 315 (2017) (rejecting the argument that an in-court identification was unduly suggestive because the defendant was the only African-American man at counsel table, the eyewitness had never been asked to identify the robber, and the in-court identification occurred more than nineteen months after the crime, as these were not circumstances attributable to improper law enforcement conduct).

Moreover, *Perry* makes clear that, for those defendants who are identified under alleged suggestive circumstances not arranged by police, other constitutional safeguards provide a criminal defendant sufficient protection against any fundamental unfairness resulting from eyewitness identifications. *Id.* at 245. These include the right to have a jury evaluate the testimony of witnesses, the right to confront eyewitnesses, the right to the effective assistance of an attorney who can expose the flaws of eyewitness testimony on cross-examination and focus the jury's attention on such flaws during opening and closing arguments, the right to present testimony about the unreliability of eyewitness identification made under certain

circumstances,[16] and the requirement that the state prove guilt beyond a reasonable doubt. *Id.* at 245-47.

Here, the defendant utilized and benefitted from these various safeguards at his trial. Defense counsel questioned law enforcement as to the defendant's weight, measurement, and approximate date of birth upon arrest.[17] RP 463-64. Defense counsel also questioned witnesses regarding Mr. Hritsco's description of the defendant at the scene. RP 476. Defense counsel had the opportunity to cross-examine Mr. Hritsco regarding his previous identification and any inaccuracy, if any, in his initial description of the defendant.[18] RP 521-23. In addition, the jury was able to observe the defendant in the courtroom and compare the initial description of the defendant with his appearance in court. Moreover, defense counsel argued what he believed to be any inconsistency in the initial description to the jury during closing argument. RP 1175-77, 1180-81. Finally, the trial court

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[16] In addition, the *Perry* court also rejected the argument that the Due Process Clause requires judicial prescreening of all identifications obtained under suggestive circumstances and expressly disapproved the idea that in-court identifications would be subject to prescreening. *Id.* at 242.

[17] The record is unclear as to whether the detective's testimony regarding the defendant's height and weight was an approximation.

[18] The defendant's reliance on admitted Ex. 115 to support his theory that the eyewitness identification was unreliable is inconsequential to his claim. Ex. 115 is a photocopy of the defendant's Washington driver's license dated March 28, 2006, which contains a small photograph presumably taken at least eight years before the murders in 2014, and ten years before commencement of trial in 2016.

instructed the jury on eyewitness identification testimony and the factors it should consider when evaluating it. CP 256; RP 1139. There was no federal due process violation because no improper police conduct has been alleged or established by the defendant. This claim fails.

C. THE DEFENDANT HAS NOT ESTABLISHED THAT ARTICLE ONE, SECTION THREE OF THE STATE CONSTITUTION PROVIDES BROADER DUE PROCESS PROTECTION REGARDING EYEWITNESS IDENTIFICATION THAN THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The defendant next argues witness Hritsco's identification of him was unreliable and should have been excluded by the trial court under the state constitution. Appellant's Br. at 23-35. Specifically, the defendant does not argue the procedure used by law enforcement for photographic lineup was impermissibly suggestive; rather, the defendant argues the identification was tainted based upon Mr. Hritsco having viewed the defendant on a local news broadcast four months after the murder and prior to the in-court identification of the defendant. He argues he is entitled to relief, suggesting article 1, section 3 of the state constitution should be interpreted more broadly than the federal due process clause and he requests this Court establish a benchmark for admissibility of eyewitness testimony when there is no state action involved in the identification process.

The *Perry* decision is consistent with our high court's opinion in *State v. Vaughn*, 101 Wn.2d 604, 607-08, 682 P.2d 878 (1984). In *Vaughn*, the defendant alleged that the robbery victims' "unreliable" in-court identification testimony, identifying him as the robber, violated his due process right. The Supreme Court affirmed the convictions, holding that "where, as here, there is no allegation that impermissibly suggestive identification procedures were utilized, the due process clause does not condition the admissibility of identification testimony upon proof of its reliability." *Id.* at 605. As in *Perry*, the analysis in *Vaughn* turned on whether the in-court identifications were "based upon [law enforcement's] suggestive identification procedures." *Id.* at 609. Because *Vaughn* did not allege "that either the pretrial or the in-court identifications were tainted by any [law enforcement] suggestive identification procedures," there was "no need to assess the reliability of [the eyewitnesses'] identification testimony." *Id.* at 608.

Similarly, in *State v. Sanchez*, 171 Wn. App. 518, 573, 288 P.3d 351 (2012), this Court held "for the exclusion of eyewitness identification to be required by the due process clause, the unnecessarily suggestive circumstances of the identification must have been arranged by law enforcement. The due process clause does not require a judicial inquiry into identifications whose reliability is in doubt for other reasons." This Court

further recognized that federal due process interests only occur if *law enforcement* use an identification procedure which is both suggestive and unnecessary. *Id*. If the defendant could establish that the identification procedure *used by law enforcement* was suggestive, the court must then decide, under the totality of the circumstances, whether "the suggestiveness created [by law enforcement lead to] a substantial likelihood of irreparable misidentification."[19] *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). As stated by the United States Supreme Court, the purpose for barring evidence of unnecessarily suggestive identifications is to deter police from using a less reliable procedure where a more reliable procedure is available. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

1. <u>This Court should reject the defendant's invitation to consider a state constitutional due process argument for the first time on appeal.</u>

The defendant presents a *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis for the first time on appeal. Under RAP 2.5(a)(3), this Court is not required to consider this argument because

[19] As stated previously, if improper police conduct is established, courts will then consider the reliability of the identification considering: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." *State v. Linares*, 98 Wn. App. at 401; *see also Biggers*, 409 U.S. at 198-200.

the defendant has failed to assert a manifest constitutional error exception. The defendant fails to provide any authority how article 1, section 3 is implicated in this case if the alleged unreliable witness identification was not arranged by law enforcement or any other state actor, but by other means. Because there was no state action, the admissibility of the in-court identification was reduced to an evidentiary ruling subject to an abuse of discretion standard. *See Kinard*, 109 Wn. App. at 432.

Indeed, the state bill of rights was adopted "to protect individuals against actions of the state." *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 422-23, 780 P.2d 1282 (1989); *see also Nguyen v. Dep't of Health Med. Quality Assurance Comm'n.*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001) (the right to due process under the Fourteenth Amendment applies only when state action deprives an individual of a liberty or property interest); *State v. McCullough*, 56 Wn. App. 655, 658, 784 P.2d 566 (1990), *review denied*, 114 Wn.2d 1025 (1990) (our state's constitutional due process only prohibits coercion of a confession by a state actor).

Here, the defendant fails to provide any analysis or authority on how the complete lack of state action regarding the witness's identification of him implicates his due process rights under article 1, section 3, of the state

constitution. Accordingly, this Court should decline his invitation to conduct an article 1, section 3 analysis.

2. Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment.

If this Court determines an article 1, section 3 analysis is appropriate, the starting point for an independent analysis of our state constitution was laid out by our Supreme Court in *Gunwall*. The court set forth six "nonexclusive neutral criteria" to direct the application of an independent state constitutional analysis in a case. 106 Wn.2d at 61-62. They are: (1) the text of the state constitution; (2) significant differences in the texts of the federal and state constitutions; (3) state constitutional and state common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Id.*

When asked whether a state constitutional provision provides greater protection than the federal constitution, appellate courts "will consider whether Washington's constitution provides greater protection than parallel federal provisions, but only if the argument adequately addresses the principles announced in *State v. Gunwall*." *State v. Lee*, 135 Wn.2d 369, 387, 957 P.2d 741 (1998). Absent such an argument, "[an

appellate court] will interpret the Washington constitution coextensively with its parallel federal counterpart." *Id.*

In *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991), the Supreme Court stated:

> This court traditionally has practiced great restraint in expanding state due process beyond federal perimeters… Although not controlling, federal decisions regarding due process are afforded great weight due to the similarity of the language [between state and federal provisions].

Our Supreme Court has repeatedly held that the substantive and procedural protections provided by the article 1, section 3 due process clause do not afford greater due process protection than the Fourteenth Amendment. *See, e.g.*, *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) ("Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment"); *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (rejecting the claim that state due process rights are greater than federal due process rights because "there are no material differences between the state and federal due process clauses"); *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) ("[t]he *Gunwall* factors do not favor an independent inquiry under article I, section 3 of the state constitution"); *see, e.g., State v. Wittenbarger*, 124 Wn.2d 467, 481, 880 P.2d 517 (1994) (Washington's due process clause affords the same protection regarding a criminal

defendant's right to discover potentially exculpatory evidence as its federal counterpart); *State v. Spurgeon*, 63 Wn. App. 503, 506, 820 P.2d 960 (1991), *review denied*, 118 Wn.2d 1024 (1992) ("Since the language of the state and federal constitutions are the same, and there is no contemporary record showing a broader meaning was intended by those adopting the Washington constitution, the first three *Gunwall* factors do not support Spurgeon's argument. Indeed, since the due process clause had an almost 100-year history in both state and federal courts before the adoption of the Washington constitution, there is a strong presumption that by adopting the same language the drafters of the state constitution intended the same protections").

Here, the first *Gunwall* criterion, the language of the state constitution, does not favor an independent interpretation. The Fourteenth Amendment states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." Washington Constitution article 1, section 3, states: "No person shall be deprived of life, liberty, or property, without due process of law." "[B]ecause the language of the state constitution and the federal constitution is the same," neither the first nor the second *Gunwall* factors favor an independent state interpretation under Washington's due process clause. *Spurgeon*, 63 Wn. App. at 506.

The second *Gunwall* criterion, comparison of the state and federal constitutional language, does not lend support to an independent interpretation. The Washington Supreme Court has held this language is virtually identical to the federal provision and article 1, section 3, as the state provision provides "no further elaboration." *In Re Matteson*, 142 Wn.2d at 310.

With respect to the third *Gunwall* factor, state constitutional history, the defendant has not provided *any* legislative history which affords a justification for interpreting the state and federal provisions differently. *See In Re Matteson*, 142 Wn.2d at 128 (when evaluating article 1, section 3, "no legislative history has been shown which would provide a justification for interpreting the identical provisions differently"); *State v. Turner*, 145 Wn. App. 899, 908, 187 P.3d 835 (2008) ("[T]here is no contemporary record showing a broader meaning was intended by those adopting the Washington Constitution, and no legislative history that provided a justification for interpreting [article 1, section 3] differently"). This factor does not support a different interpretation than the federal constitution.

With respect to the fourth *Gunwall* factor, preexisting state law, several cases that predate both *Vaughn* and *Brathwaite* support the conclusion that the state and federal due process clauses provide the same degree of protection regarding eyewitness identification. *See State v. Miller*,

78 Wash. 268, 271, 138 P. 896 (1914) ("The testimony of a witness that it was her 'best judgment' that the defendant was the same man who came to her home on a previous occasion was competent evidence and defense counsel's objection went to its weight, which was for the jury"); *State v. Spadoni*, 137 Wash. 684, 690-91, 243 P. 854 (1926) ("Any evidence tending to identify the accused as the guilty person is relevant and competent… Nor need the evidence be so far positive as to leave nothing but the credibility of the witnesses to be considered. Uncertainty in this respect affects only the weight of the evidence, not its admissibility… [W]e have adopted the rule that on the matter of the identification of [people] or things, such testimony is admissible"); *State v. James*, 165 Wash. 120, 122, 4 P.2d 879 (1931) ("The jury heard the testimony as to the positive identification, and heard the witnesses say that, on the two prior occasions, they had not been positive, and it was for them to determine whether they would accept the positive identification testimony or disregard it. This court cannot weigh the testimony and hold that the jury has no right to believe and accept the evidence of positive identification"); *State v. Brown*, 76 Wn.2d 352, 353, 458 P.2d 165 (1969) (the defendant was identified at trial by an eyewitness who had also previously identified him in a photomontage. The defendant did not allege that there was anything improper about the initial identification procedure. Rather, he objected to the in-court identification

procedure because he "was the only [African-American] in the courtroom." Our high court held that the State was not required to arrange less suggestive identification circumstances).[20]

The fifth *Gunwall* criterion, the differences in structure between state and federal constitutions, also does not support an expanded interpretation. The Washington Supreme Court has held that while this factor "may support the notion that our constitution is more protective in a general sense" with respect to article 1, section 3, "it does not shed any light on this particular issue." *In Re Matteson*, 142 Wn.2d at 310-11. The same is true in the present case about eyewitness identification, and review is not appropriate under this factor.

As to the sixth *Gunwall* factor, the defendant does not cite any authority suggesting that Washington has a particular concern in limiting in-court identifications made by eyewitnesses. Moreover, "it might be argued that every provision of the state constitution is a matter of particular state concern. But if that were, by itself, reason to embark on an independent analysis, the entire *Gunwall* framework would be rendered superfluous."

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[20] *See also State v. Gosby*, 85 Wn.2d 758, 760, 539 P.2d 680 (1975) (the defendants urged the Supreme Court to establish a "base line" of reliability below which evidence must not fall to be admitted. The court refused to do so. Instead, the court adhered to the rule that any evidence tending to identify the accused is relevant, competent, and admissible. Uncertainty or inconsistencies in the testimony affects only the weight of the testimony and not its admissibility).

State v. Martin, 151 Wn. App. 98, 115-16, 210 P.3d 345 (2009), *aff'd on other grounds by* 171 Wn.2d 521 (2011).

3. News broadcast of the defendant.

The Ninth Circuit has considered an in-court identification made by a witness who had previously seen a suggestive newspaper photograph of the accused on at least two occasions, and upheld a conviction based on such an identification. *United States v. Peele*, 574 F.2d 489 (9th Cir. 1978). In *Peele,* the defense learned during trial that one of the prosecution witnesses had seen a photograph of the defendant in a newspaper related to the crime, and that she told prosecutors that her identification of the appellant in a police line-up had been aided by the newspaper photo. *Id.* The Ninth Circuit stated that "[t]he extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or the ability of the witness to articulate or relate the identifying characteristics of the accused, is a proper issue for the trier of fact to determine." *Id.* at 491; *see also United States v. Elliot*, 915 F.2d 1455, 1457 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 2020 (1991) (upholding the admission of an in-court identification by a witness who had seen a 15-year old photograph of the accused in a local paper prior to identifying him in a police line-up); *United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir.

1986) (finding no due process right to judicial evaluation of reliability under *Biggers* where witness saw defendant's picture on television).

Similarly, in *United States v. Zeiler*, 470 F.2d 717, 720 (3rd Cir. 1972), four robbery witnesses testified, at a suppression hearing, that they saw pictures of the defendant's arrest on television and in the newspaper prior to viewing the defendant in a photograph display. In that case, the Third Circuit reasoned that the constitutional guarantees protect the defendant from an impartial jury, but not an impartial witness. Specifically, the court stated, "we long ago abandoned the practice of disqualifying witnesses because of presumed bias. Bias can be examined through cross-examination, and juries are free to disregard biased testimony. The same standards cannot be applied to both jurors and witnesses vis-a-vis pretrial publicity." *Id.* at 720; *see also Green v. State*, 279 Ga. 455, 614 S.E.2d 751, 754-55 (2005) (refusing to find the identification unduly suggestive and violative of due process because the State had no involvement in televising the defendant's arrest); *State v. Nordstrom*, 200 Ariz. 229, 241, 25 P.3d 717 (2001), *cert. denied*, 534 U.S. 1046 (2001) (holding there was no state action potentially tainting a pretrial identification where a witness identified the defendant based on a news broadcast of his arraignment), *overruled on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

In that regard, *Perry* clarified the distinction between potentially suggestive circumstances, and police-arranged suggestive procedures with some examples:

> Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have "suggested" to the witness that the defendant was the person the witness observed committing the crime.

565 U.S. at 244. Such circumstances, however "suggestive," do not implicate the due process rule of *Biggers* and *Brathwaite* because they do not involve police-initiated identification procedures. *Id*.

The defendant primarily relies on *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), for the proposition that preexisting caselaw has expanded article 1, section 3, past the federal due process clause.[21] In *Bartholomew*, the Supreme Court held that certain provisions of Washington's death penalty statute violated the federal due process clause because they permitted consideration of any relevant evidence at the trial's penalty phase regardless of its reliability. The court ultimately held that due process requires that the rules of evidence must apply in a capital sentencing

[21] *Bartholomew* was filed the same day as *Vaughn.*

proceeding. In so holding, the court declined to rely solely on the federal constitution.

The *Bartholomew* case simply held that the rules of evidence must apply to evidence presented by the State during the sentencing phase of a death penalty case, nothing more. *Id.* at 649. Its holding should be limited to the facts of that case. Thus, the fourth factor does not necessitate an independent examination based upon a long line of cases from our Supreme Court holding that issues of reliability and credibility of eyewitness identifications go to the weight and not admissibility of such evidence.

Accordingly, preexisting state law does not support a conclusion that an independent state analysis is warranted in this case as it is in conformity with *Vaughn* and *Braithwaite*. The defendant cannot meet this standard, nor has he argued the identification procedure employed by law enforcement was suggestive or unnecessary. Independent of any law enforcement practice, the witness did identify the defendant after observing his photograph on a television news broadcast.

Moreover, the trial court was not given the opportunity to rule on this issue or take any evidence. This Court should decline the invitation to analyze this issue under article 1, section 3 of our state constitution for the first time on appeal. Moreover, the trial court did not abuse its discretion when it determined the in-court identification would be admissible at the

time of trial, as such an identification goes to the weight, and not admissibility.

D. THE DEFENDANT FAILS TO ESTABLISH THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED SEVERAL ERRANT COMMENTS MADE BY A WITNESS REGARDING SEVERAL COMMON TRAITS OF HER FATHER. IF THERE WAS ERROR, IT WAS HARMLESS BECAUSE THE DEFENDANT HAS NOT ESTABLISHED IT IMPACTED THE VERDICT.

The defendant next asserts that the trial court erred when it allowed a witness, over defense counsel's objection, to testify that her father, Arturo Gallegos, was funny, kind-hearted, and church-going. *See* Appellant's Br. at 35-38; RP 439-40.

Standard of review.

A trial court has discretion concerning the admissibility and relevance of evidence. *State v. Sherburn*, 5 Wn. App. 103, 105, 485 P.2d 624 (1971). The standard for relevancy is whether the evidence gives rise to reasonable inferences regarding the issue at hand or sheds any light upon it. *Id.* at 105. Relevancy means a logical relation between evidence and the fact to be established. *Id*. If evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence is unfairly prejudicial if it is "more likely to arouse an emotional response than a rational decision by the jury." *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009).

If the party challenging an evidentiary ruling establishes that the trial court abused its discretion, an appellate court will not reverse a conviction unless the evidentiary ruling prejudiced the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Since evidentiary errors are not of constitutional magnitude, they are harmless unless "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error in an evidentiary ruling is harmless if "the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id.*

Other than proclaiming the evidence impacted the verdict, the defendant has not cited any case authority or provided any analysis as to how these few, isolated remarks from examination by a single witness impacted an otherwise lengthy trial with many witnesses. Moreover, the fact that the jury was informed that the witness's father/victim had a sense of humor, was church going, and kind-hearted may have had marginal relevance, but the defendant fails to show how such characteristics are inherently prejudicial or how these otherwise common features impacted the verdict.

Furthermore, at the conclusion of the case, the trial court instructed the jurors not to allow sympathy to guide their decision-making. RP 1126; CP 251. Jurors are presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). The defendant does not provide any facts to rebut this presumption and his claim fails.

E. IF ADMISSION OF MS. VALERIO'S TESTIMONY THAT THE DEFENDANT WAS KNOWN AS "DEMON" WAS ERROR, IT WAS HARMLESS BECAUSE IT WAS CUMULATIVE OF OTHER COMPETENT ADMISSIBLE EVIDENCE.

The defendant next argues Rosemary Valerio's testimony that she heard the defendant used the name "Demon" was inadmissible hearsay and prejudicial. *See* Appellant's Br. at 38-40.

Standard of review.

An appellate court reviews whether a statement was hearsay de novo. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688, 370 P.3d 989 (2016). As stated above, an erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced. *Thomas*, 150 Wn.2d at 871. The erroneous admission of hearsay is harmless error unless, within reasonable probabilities, the improper evidence affected the outcome of the trial. *Gonzalez-Gonzalez*, 193 Wn. App. at 690-91.

Here, if the admission of Ms. Valerio's testimony was error, it was harmless. Another witness, Mr. Valerio, testified he knew the defendant's moniker was "Demon," as the defendant had referred to himself as

"Demon" and, at some point, had changed his Facebook account from "Chris" to "Demon." RP 385. If anything, admitting the statement was harmless because the complained of testimony was cumulative of other admissible evidence obtained from Mr. Valerio. *See State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) ("Evidence that is merely cumulative of overwhelming untainted evidence is harmless"); *United States v. Trujillo*, 376 F.3d 593, 612 (6th Cir. 2004) (finding admission of hearsay was harmless error, in part, because hearsay was duplicative of other significant admissible evidence); *United States v. Williamson*, 450 F.2d 585, 591 (5th Cir. 1971) (finding admission of materially identical testimony did not result in prejudicial error dictating reversal). This claim fails.

F. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT BECAUSE HIS ARGUMENT WAS BASED UPON THE EVIDENCE AND REASONABLE INFERENCES FROM THE EVIDENCE.

The defendant next asserts the deputy prosecutor's remarks during closing argument constituted misconduct regarding the defendant's thought process during the multiple times he fired the gun at Juan and whether this constituted premeditation. *See* Appellant's Br. at 42. He further argues that it was misconduct to ask the jury to consider Juan's emotional state during the time in which the defendant fired the gun at him multiple times. *See*

Appellant's Br. at 42. There was no objection by the defense to these remarks at the time of trial.

In closing argument, the prosecutor has wide latitude in making arguments to the jury and can draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

To prevail on a prosecutorial misconduct claim, a defendant must prove that the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). In addition, if the defendant did not object to a prosecutor's conduct at trial, the defendant is deemed to have waived the error unless the misconduct was so flagrant and ill-intentioned that (1) an instruction could not have cured the resulting prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

In making this determination, an appellate court "focus[es] less on whether the prosecutor's misconduct was flagrant or ill[-]intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

To analyze prejudice, an appellate court looks at the comments in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). In short, an appellate court asks, "[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Emery*, 174 Wn.2d at 762.

Here, when discussing premeditation, the deputy prosecutor made the following observations:

> And he didn't want Juan Gallegos to see him and be a witness either, so he shoots him two times through the door. And he probably can't give a good bead on him as he's going through the apartment, because it's so small and twisting and turning. But as soon as they get outside, Christopher Ramirez is right behind him, just right behind him. And Juan Gallegos doesn't stand a chance, because now Chris has line of sight and he has the gun. And he has a decision. Is it the first shot? Is it the second? Is it the third, the fourth, the fifth, sixth, seventh, eighth, the ninth, tenth? It's premeditation. It's cold. It's coming up from behind somebody and putting so many bullets into them that the end of their life must have been absolutely miserable.
>
> Think about all those wounds that Juan Gallegos had. Think about what he felt like in the last 30 seconds, maybe? That's premeditation.

RP 1166-67.

Prosecutors commit misconduct when they use arguments designed to arouse the passions or prejudices of the jury. *In Re Glasmann*, 175 Wn.2d

at 704. Such arguments create a danger that the jury may convict for reasons other than the evidence. *See State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

In the present case, defense counsel did not object at trial to the statements he challenges on appeal. Moreover, his defense was one of general denial. During closing arguments, the deputy prosecutor argued the State had established the requisite premeditation and intent of the defendant by the time elapsed and number of shots fired at Juan by the defendant, and the proximity of the defendant to Juan regarding several of the shots. Stating that Juan "must have been absolutely miserable" during the 30-second time frame in which the multiple shots were fired at him was a reasonable, evident inference from the evidence. Here, the defendant has failed to meet his burden of proving that the two comments constituted error.

Moreover, if the argument was error, the defendant has not established it was so flagrant and ill-intentioned that a curative instruction could not have cured it and that the alleged misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. Finally, the jury was instructed that lawyers' statements are not evidence. RP 1125; CP 250. Jurors are presumed to have followed this instruction. *See Warren*, 165 Wn.2d at 29. The defendant has not provided any evidence to rebut this presumption and his claim fails.

G. THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT A *FRYE* HEARING ON THE ADMISSIBILITY OF HISTORICAL CELL SITE ANALYSIS. HOWEVER, THE COURT DID CONDUCT A *FRYE* HEARING AND DETERMINED THAT THE PROCEDURE USED BY LAW ENFORCEMENT WAS AN ACCEPTED SCIENTIFIC TECHNIQUE OR PROCEDURE AND WAS NOT NEW OR NOVEL. THE DEFENDANT HAS FAILED TO ESTABLISH OTHERWISE.

The defendant next argues the trial court erred when it determined that a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) was unnecessary on the admissibility of the FBI agent's historical cell site analysis regarding the location of the defendant's cell phone surrounding the time of the murders. *See* Appellant's Br. at 43-47.

Contrary to the defendant's assertion, the trial court conducted a *Frye* hearing regarding the admissibility of the cell site analysis prepared by Agent Banks prior to trial. RP 68-69, 92-120 (FBI Agent Banks hearing testimony), RP 216-220 (ruling). The agent had been employed by the FBI since 2003. In May of 2011, in addition to on the job training, Agent Banks went through four weeks of training with the FBI, which included an introduction to radio frequency theory, different cellular protocols and different types of technologies that the cellular providers use to transmit to make the phones communicate with the cell towers. RP 94. She also received training from the service providers, including AT&T, Sprint,

T-Mobile, Cricket at the time, Metro PCS and Verizon. Specifically, Agent Banks was educated regarding:

> [h]ow the call detail records that we get from them are populated based on what we had learned from the engineering courses we took and how their signals are propagated out into the environment and why they set up their networks the way they do to service their customers.

RP 95.

Agent Banks also participated in field training exercises, taking measurements of the cellular networks, reviewing signal strengths, and determining how different providers set up their networks. RP 95-96.

Because of her training and education, Agent Banks was assigned to the FBI's Cellular Analysis Survey Team (CAST). RP 96-97. For approximately one and one-half years, Agent Banks was a program level manager at the FBI headquarters and she was responsible for creating a curriculum and training for new CAST agents and representatives from local law enforcement and foreign law enforcement agencies. RP 97-101.

In this case, Agent Banks was provided the cellular records from the telephone company which showed the time and date of a call, the elapsed time it took to connect when the send button was pressed (seizure time), and the length of the call. RP 911. In addition, the records indicated the caller's telephone number, account number, cellular tower location, longitude and latitude, and the direction of the tower antenna radio signal at the time of

the call or text. RP 911-12. From that information, Agent Banks determined which cell phone tower the defendant's cell phone used and the direction of the radio signal from the actual tower, when activated by a call or text. RP 929. The cell phone records provided only a general geographical area between two towers regarding the cell phone's location pertaining to call or text. RP 103, 916, 919.

Agent Banks utilized a "drive test" because the cell towers were located within proximity to each other. RP 104. In doing so, the agent used the "Gladiator Ontomonus receiver," which scanned all cellular frequencies within the general area of the crime scene. RP 104. With the device, Agent Banks identified which cell phone tower activated at a time comparing it to the cell phone company's data. RP 104. The software identified which tower within a given area provided the strongest radio signal strength. RP 104. She had mapping software which placed the data taken from the receiver onto a map; i.e., it collected the radio frequency signal strengths from all available towers, which allowed the agent to determine that a cell phone more likely used one tower as opposed to another, less dominant tower in a multiple tower/antenna coverage area at the time and date of the murder. RP 105, 927.

The collection device described by the agent was accepted within the cellular telephone business community, and was also used by cellular

companies to perfect their networks. RP 105-06. The software program used by Agent Banks was internally validated by both the FBI and by the software company, Gladiator. RP 114. In addition, each CAST FBI agent's analysis was independently peer reviewed by another CAST member. RP 108, 941-43. Agent Banks approximated 400 courts across the United States, including the Western and Eastern District Federal Courts, had accepted the science and methodology relied on by the agent. RP 119-20. The defense did not call any witnesses or provide the trial court with any contrary evidence.

Thereafter, at the time of the *Frye* hearing, the trial court orally ruled and denied the motion, stating, in relevant part:

> Here, following what the State brought out of the testimony of Special Agent Banks, in the defense's cross-examination or with the State's own affirmative presentation, evidence elicited by the defense didn't show that the cellular analysis or tracking utilized by Agent Banks is new or novel. The defense did not show that the science underlying cellular analysis is unsound or not reliable. Evidence elicited by the defense failed to show, and I say that respectfully, that cellular analysis or tracking is not generally accepted in Special Agent Bank's scientific community. Moreover, the court was not provided with any literature that showed cellular analysis and tracking was new or novel, it is not based on sound science or that it is not accepted in the scientific community.
>
> In sum, conducting my own research, reviewing all the submissions of the parties, hearing the testimony of Agent Banks, I feel like I'm obligated to find that it was not necessary to hold is [sic] a *Frye* hearing; however, after having held one, the evidence adduced demonstrated that Special Agent Banks' science and methods

> satisfied the *Frye* test, as well as ER 702. And therefore, I feel obligated to deny that motion in limine.

RP 216-20.

Standard of review.

The admissibility of evidence under *Frye* is a mixed question of law and fact that an appellate court review's de novo. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

Courts in Washington adhere to the *Frye* test in evaluating the admissibility of novel scientific evidence. *Id.* at 261. Under *Frye*, novel scientific evidence is admissible only where it is based on methods that are generally accepted in the relevant scientific community. *Det. of Ritter v. State*, 177 Wn. App. 519, 522, 312 P.3d 723 (2013), *review denied*, 180 Wn.2d 1028 (2014). The technique must be capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

An appellate court does not attempt to determine whether the scientific theory is correct; its review is merely of whether the theory is generally accepted in the scientific community. *Lake Chelan Shores Homeowner's Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175-76, 313 P.3d 408 (2013). An appellate court may examine judicial decisions from other jurisdictions, but the relevant inquiry is the general acceptance by scientists, not by courts. *State v. Cauthron*, 120 Wn.2d 879,

888, 846 P.2d 502 (1993), *overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 65-66, 941 P.2d 667 (1997).

General acceptance may be found "from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts." *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000). If there is a significant dispute between qualified experts as to the validity of scientific evidence, there is no general acceptance. *Cauthron*, 120 Wn.2d at 887.

One commentator has explained the process for cell phone mapping:

> Cellular telephone networks are divided into geographic coverage areas known as "cells," which range in diameter from many miles in suburban or rural areas to several hundred feet in urban areas. When a cell phone is switched "on," it periodically transmits a signal to all tower antennae within the phone's range. The time distance of arrival method essentially tracks a phone's longitude and latitude when a communication is sent or received, and a triangulation algorithm produces an estimate of the phone's location by measuring the time it takes for different cell towers' signals to reach the phone. Like the time distance of arrival method, the angle of arrival method relies on transmissions between the phone and a tower, but the algorithm uses the angles of the signals, rather than a measurement of time, to approximate the phone's location. The calculation's accuracy depends to some degree on the number of cell towers within the phone's range. For example, the triangulation methods are generally less accurate in rural areas with fewer cell towers.
>
> …
>
> When a cell phone sends or receives a communication, the cellular provider automatically records a data set corresponding to each call or text message for billing purposes. Most standard call detail

> records show the time of the call, the duration of the call, the tower from which the call was sent or received, and the specific "face" of the tower from which the call was sent or received. This face represents one of three separate directional vectors that look like "120 degree slices of a full 360 degree pie."
>
> Once a party has obtained the call detail record for the relevant dates and times, the information can be synthesized to map the vectors approximating the phone's location when it sent or received a communication, producing a visual graphic for the courtroom.

Ryan W. Dumm, THE ADMISSIBILITY OF CELL SITE LOCATION INFORMATION, 36 Seattle U. L. Rev. 1473, 1479-80 (internal citations omitted) (2013).

Here, Agent Banks testified that a cell phone uses radio signals to connect to cell towers, which is generally but not always the closest tower to the cell phone. Once the cell phone's radio signal connects to a tower, the telephone company records some basic information about the call, such as the phone numbers involved, the length of the call, and the identification of the connecting tower and its directionality.

The agent used a device to determine the relative radio wave strength of a tower or towers with proximity to each other to determine which tower emitted a stronger radio signal and in which direction the signal pointed. The agent then used the records and the strength of the towers' radio signals, and direction of the signal from the tower, and then placed corresponding tower locations and radio wave path on a map.

Here, the defendant makes no argument concerning the cell companies' ability to accurately record the information, nor does he argue that the use of radio waves is in some way "new" or "novel."

The State presented several demonstrative maps to the jury showing the location of the cell site towers which defendant's cell phone connected to during the time of the murders and the times at which the connections occurred. The maps showed the "120 degree radio wave arc" of the cell tower at the times it was activated by the most dominant tower in the area of the crime scene.

In short, the agent created two maps with no more than reading the defendant's cell phone records for a given time and date, determining which cell tower emitted the strongest radio signal, and transferring that information to a map. Reading the coordinates of cell sites and times the tower was activated from phone records, determining the relative radio wave strength of each tower and radio wave direction of that tower, and plotting that information on a map is not a new or novel scientific procedure or technique, and the *Frye* standard is not applicable.

1. <u>The technique used by the FBI agent was not a scientific technique or procedure.</u>

The above outlined investigative technique is not scientific evidence. If anything, it is a mathematical procedure. *See People v.*

Fountain, 62 N.E.3d 1107 (Ill. 2016) ("Reading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique, and the *Frye* standard is not applicable"), *appeal denied*, 65 N.E.3d 844 (Ill. 2016); Dumm, THE ADMISSIBILITY OF CELL SITE LOCATION INFORMATION, 36 Seattle U. L. Rev. at 1494 ("[T]he secondary mapping programs should not be subject to *Frye*. While a defendant may object to the introduction of cell site location information on the ground that it is not generally accepted in the scientific community, this objection may be somewhat misguided because the technology does not rely on new or unusual scientific principles").

2. <u>If the recording of the cell site information is scientific, the trial court did not err when it found the technology was not new or novel and it was accepted within the relevant cellular community.</u>

In *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003), a bank teller gave the defendant a bag of money which contained a tracking device. *Id.* at 849. The tracking device broadcasted a radio signal which led police to the defendant. *Id.* The trial court denied the defense request for a *Frye* hearing. *Id.* at 850.

The tracking system employed common technology involving the transmission and reception of radio signals between the tracking device, receiving unit, and transmission towers. *Id.* at 862. The court held the

tracking system did not involve a novel scientific theory, and a *Frye* hearing was not required. *Id.* at 862.

In *United States v. Hill*, 818 F.3d 289, 297 (7th Cir. 2016), the Seventh Circuit concluded that the "science and methods upon which historical cell-site analysis is based are understood and well documented." *Id.* at 297. The court explained:

> Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cell phone connected, and the science is well understood. (*United States v. Evans*, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)) (noting that methods of "historical cell site analysis can be and have been tested by scientists"). The technique has been subjected to publication and peer criticism, if not peer review. [Citations omitted.] The advantages, drawbacks, confounds, and limitations of historical cell-site analysis are well known by experts in the law enforcement and academic communities.

Id. at 298.

The *Hill* court stated that such methods are reliable in cases where an expert makes clear that the mapping technology lacks the ability to pinpoint a defendant's exact location. *Id*. at 298.

Likewise, in *United States v. Schaffer*, 439 Fed. Appx. 344, 347 (5th Cir. 2011), the defendant argued that cell site analysis testimony was inadmissible because the field lacks any "indicia of scientific reliability."

Id. at 346. Applying the federal *Daubert* [22] standard, the court reasoned that "the field is neither untested nor unestablished," and that numerous federal courts have accepted cell site analysis as a reliable source of expert testimony. *Id.* at 347.

In *State v. Patton*, 419 S.W.3d 125, 129-30 (Mo. Ct. App. 2013), the defendant contended that locating a phone in relation to the cell sites required a *Frye* hearing before it could be admitted. The appellate court disagreed, holding:

> Here, the State presented a map showing the locations of the cell sites to which [the defendant's] phone connected and the times at which those connections occurred. The State argues that this is not scientific evidence, because creating the map involved no more than reading [the defendant's] cell phone records and transferring that information to a map of the greater Saint Louis area. In this limited instance, we agree. Reading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique, and the *Frye* standard is not applicable.

Id. at 129-30; *see also Jackson v. Allstate Ins. Co.,* 785 F.3d 1193, 1204 n. 5 (8th Cir. 2015) (rejecting argument that cell site analysis data is inherently unreliable as evidence); *Schaffer*, 439 Fed. Appx. at 347 (5th Cir.2011) (concluding that expert testimony on historical cell site location data was neither "untested nor unestablished" and holding that trial court did not abuse discretion in permitting FBI agent to testify as expert in field);

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[22] *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2789, 125 L.Ed.2d 469 (1993).

Fountain, 2016 IL App (1st) at 59 ("[r]egardless whether historical cell site evidence is scientific, the use of cell phone location records to determine the general location of a cell phone is not "new" or "novel" and has been widely accepted as reliable by numerous courts throughout the nation"); *Stevenson v. State*, 222 Md. App. 118, 112 A.3d 959, 968 (Md. Ct. Spec. App. 2015) (holding that the circuit court properly declined to conduct a *Frye* hearing into the use of call detail records to determine the time and location of defendant's cell phone's connection to particular cell towers and noting the that cell phone location evidence was not novel scientific evidence, the technique's reliability and wide acceptance by numerous courts); *State v. White*, 37 N.E.3d 1271, 1280-81 (Ohio App. 2015) (holding that cell site analysis from FBI special agent was reliable evidence).

3. Proprietary nature of the FBI's cell phone mapping product.

The defendant has failed to offer any evidence, either at the time of trial or on appeal, that there is a legitimate dispute over the FBI's methodology or that it constitutes "novel" "scientific" evidence. Furthermore, the defendant has not offered any evidence that the methodology is considered unreliable by any segment within its relevant community.

The State introduced the evidence not to show an exact location but that the cell phone, and by implication, the defendant, were near the crime

scene during the relevant period. Defendant makes no argument concerning the cell companies' ability to accurately record the stated information, nor does he argue that the use of radio waves is in some way "new" or "novel."

The trial court did not err when it determined a *Frye* hearing was unnecessary; but having conducted a *Frye* hearing that there was nothing new or novel about the cellular site analysis evidence. There was no error.

H. THE JULY 15, 2014 TEXT MESSAGE OF THE DEFENDANT WAS PROBATIVE TO ESTABLISH MOTIVE, PREMEDITATION AND INTENT.

The defendant next argues the July 15, 2014, text message[23] was not relevant, and it was substantially more prejudicial than probative. *See* Appellant's Br. at 47-51.

Standard of review.

An appellate court reviews a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

At the time of trial, the defense argued the text message sent by the defendant was sent to a group and it was too attenuated in time from the commission of the murder. RP 170-80. The defense argued in the

[23] The text message read: "Tio. We all die. Rest in peace. Fuck you all if that's how it is." RP 375. Included within the text were photos of Arturo and Juan. RP 375. "Tio" refers to "uncle" in the Spanish language. https://www.ancestry.com/name-origin?surname=tio.

alternative that, if the court permitted introduction of the July 15, 2014 text message, the court should allow other text messages exchanged between the defendant, Juan and Arturo to establish perspective. RP 182-83. The court ruled the July 15, 2014 text was admissible and probative to show intent, motive, premeditation, and the probative value outweighed in prejudicial effect. RP 185. Specifically, regarding any potential prejudice, the court ruled: "Although all adverse evidence is prejudicial, given the totality of evidence, arguments of counsel and authorities, here I find the prejudicial effect does not outweigh the probative value in this case based on the totality of the submissions by the parties." RP 221.

Evidence may be admitted under ER 404(b)[24] to prove an essential element of the charged crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) was not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because

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[24] ER 404(a) and (b) state, in pertinent part:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* at 175. Moreover, "[m]otive and prior conduct of a defendant is as much a part of the substantive evidence to show premeditation as is the immediate reflective deliberation which precedes the act itself." *State v. Ross*, 56 Wn.2d 344, 349, 353 P.2d 885 (1960).

Here, the prior threat was relevant as to whether the defendant acted with premeditation, an essential element of the charged crime of aggravated first degree murder, and whether the murders were a part of a common scheme or plan pertaining to the aggravated penalty. More specifically, it was relevant to establish the on-going ill-will (in conjunction with other facts such as the on-going feud with Juan, and the defendant not being allowed within the apartment) between the defendant and Arturo and Juan.

"[E]vidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent." *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995). This evidence is particularly relevant where, as here, "malice or premeditation is at issue." *Id.* "Such evidence tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice and

premeditation." *Id.* at 261-62.[25] *See also State v. Sherrill*, 145 Wn. App. 473, 486, 186 P.3d 1157 (2008), *review denied*, 165 Wn.2d 1022 (2009) (an inference of premeditation is supported by evidence of prior threats or quarrels); *Hoffman*, 116 Wn.2d at 83 (defendant's statements made prior to the crime may be considered when determining whether the defendant acted with premeditation).

Here, the trial court carefully weighed the evidence and determined the prior threat was admissible under ER 404(b) because it was probative regarding motive and intent, which was relevant to show premeditation. It concluded the text was not unfairly prejudicial because it demonstrated intent and motive, and the defense would be allowed to introduce other text messages that were not threatening in nature during the same time frame. The trial court did not abuse its discretion. The court thoroughly weighed the texts prejudicial effect against its probative value, and its conclusion that the probative value outweighed any potential prejudice was reasonable.

Here, the text message from the defendant was relevant to show that over a course of about four months prior to the fatal shooting, the defendant

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[25] "Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term 'prejudice' is used in Rule 403." 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 403.3 at 440 (5th ed. 2007).

made a veiled threat toward others, including Juan and Arturo. This evidence was important to help the State meet its burden of convincing the jury that the defendant's decision to kill Arturo and Juan was not one made on the "spur of the moment," but rather was additional evidence the murders were preplanned. The trial court did not abuse its discretion.

I. THE DEFENDANT WAS PROVIDED ADEQUATE NOTICE OF BEING CHARGED WITH AGGRAVATED MURDER BY A COMMON SCHEME OR PLAN, AND HE HAS NOT ESTABLISHED PREJUDICE FROM THE LANGUAGE CONTAINED WITHIN THE INFORMATION.

The Washington and federal constitutions entitle criminal defendants to adequate notice of the nature and cause of the accusation so that they may prepare a defense. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012).

Here, the defendant was charged by amended information with two counts of aggravated premeditated first degree murder. CP 232-33. Each count alleged the "murder was a part of a common scheme or plan." CP 232-33. The defendant did not object to or challenge the information in the trial court. Importantly, the State did not charge an "aggravating factor" as defined by RCW 9.94A.535(2) and RCW 9.94A.537, which allows for an upward departure from the standard sentence range.

Although a constitutional challenge to the sufficiency of the information can be raised for the first time on appeal, in such circumstances,

an appellate court will liberally construe the document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Accordingly, where a defendant has failed to object to the charging document prior to the verdict, an appellate court will find the information constitutionally sufficient where: (1) "the necessary facts appear in any form, or by fair construction can … be found" on the face of the charging document, and (2) the defendant cannot "show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice." *Id.* at 105-06.

Aggravating factors are not "elements of [a] crime;" they are "aggravation of penalty" factors. *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995). Furthermore, aggravated first degree murder is not a crime in and of itself; the crime is premeditated first degree murder, accompanied by an allegation of an aggravating circumstance identified under RCW 10.95.020.[26] *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988). "[U]nder the statutory scheme in Washington the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence

[26] In the present case, RCW 10.95.020(1) would have been applicable. It states: "There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person."

from life with the possibility of parole to life without the possibility of parole or the death penalty." *Thomas*, 150 Wn.2d at 848.

Here, the amended information adequately apprised the defendant that the State had charged him with aggravated murder based upon a common scheme or plan and it was alleged within the information that he had committed several murders. The defendant was reasonably apprised the State could seek to prove the aggravator by one or both alternative means. Moreover, the defendant did not object to the jury instructions and his defense was one of general denial. *See, e.g., State v. Brewczynski*, 173 Wn. App. 541, 552, 294 P.3d 825 (2013), *review denied*, 177 Wn.2d 1026 (2013).

Notwithstanding the above analysis, both convictions for aggravated premeditated first degree murder require either the imposition of the death penalty or life imprisonment without the possibility of parole under RCW 10.95.030. However, in the present case, the defendant was sentenced to a standard range sentence under RCW 9.94A.589(1)(b) (multiple serious violent offenses). CP 311-342. For this reason alone, the defendant cannot establish any prejudice.

The defendant also argues the trial court failed to follow the procedure mandated by the SRA because the court failed to acknowledge the potential for a mitigated sentence, even though one was not requested

by the defense. At the time of sentencing, the court stated: "As indicated by the prosecutor in his opening remarks, the law requires that the two sentences for Count I and II run consecutive, which means one after another." RP 1231. Indeed, under the SRA's multiple offense policy, the standard range for two or more serious violent offenses is consecutive sentences. RCW 9.94A.589(1)(b).

In *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002), the trial court indicated that it wanted to impose an exceptional sentence downward, but incorrectly believed it lacked the ability to do so. The court held if the sentencing court fails to recognize its discretion to impose such a sentence, resentencing is an appropriate remedy except "when the reviewing court is confident that the trial court would impose the same sentence" after properly exercising its discretion. *Id.* at 100. If "the [sentencing] court's comments indicate it would have considered an exceptional sentence had it known it could," resentencing is appropriate. *Id.* at 100-01.

At sentencing the trial court remarked:

> Weighing the seriousness of these crimes, the jury's verdict, and your history, along with the other factors that I've described from the Sentencing Reform Act, including trying to be just with the punishment, I find that you should be sentenced to 608 months on Count I for the death of Arturo Gallegos, and your sentence should be 380 months for Count II on Juan Gallegos-Rodriguez, both of those gentlemen, your uncles, and that they will run consecutively, as I am required to provide by the statute.

RP 1231.

Unlike *McGill*, this case does not involve an erroneous application of the law and nothing in the record suggests the trial court was unaware of its decision-making authority or discretion under RCW 9.94A.535(1)(g) (downward departure from the standard range) or the relevant case law. Moreover, there is no indication that the trial court would have considered or imposed a low-end standard range sentence, let alone an exceptional sentence downward. Instead, the trial court's imposition of high-end standard-range sentences on both murders conveys the opposite conclusion. Indeed, the trial court calculated the defendant's offender score as a "9," for count one, for sentencing purposes. CP 314. The defendant has failed to show the trial court would have imposed a mitigated sentence if it had been requested to do so and his claim fails.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 23 day of January, 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER B. RAMIREZ, Appellant.	NO. 34872-5-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 23, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marla Zink
wapofficemail@washapp.org

1/23/2018 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

January 23, 2018 - 9:52 AM

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